No. 87-1218

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

DAVID WEAVER ADAMS, *et al.*,
Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC., *et al.*,
Respondents.

JOHN ERIC CLIFTON, *et al.*,
Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Question Presented

Whether the Court of Appeals and the District Court considered the correct factors in concluding that former employees of Laker Airways Limited, a liquidated airline, lack antitrust standing to seek treble damages for injuries purportedly sustained as a result of an alleged conspiracy to drive their employer out of business?

Statement Pursuant to Rule 28.1

The parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of respondents are as follows:

British Airways Plc

Airline Tariff Publishing Company; Air Mauritius Ltd; The Airplus Company Ltd.; Atlas Holidays Ltd.; Beau Vallon Properties Ltd.; Belfast Europa Ltd.; British Caledonian Airways Ltd.; Brussels Europa Societe Anonyme; Eupo-Air Holdings Ltd.; Eupo-Air Travel Services Ltd.; GB Airways Ltd.; Holts Paris Welcome Service S.A.; IAL Caribbean Ltd.; Isotal (Imobiliaria Do Sotavento Do Algarve); Karsy Walk Inn Ltd.; Kenya Safari Lodges & Hotels Ltd.; Los Angeles Technical Services Corp.; Mosside Enterprises Ltd.; Penta Hotels N.V.; The Plimsoll Line Ltd.; San Francisco Foreign Flag Carrier Corp.; Sun Resorts Ltd.; Tourism Promotion Services (Kenya) Ltd.; Tourism Promotion Services (Uganda) Ltd.; Travel Automation Services Ltd.

British Caledonian Airways Limited

British Airways Plc; British Caledonian Flight Training Ltd.; British Caledonian Group Plc; Cal Air International Ltd.; Caledonian Air Leasing Ltd.; Impact Publishing International Ltd.

Deutsche Luftansa Aktiengesellschaft

Deutsche Hotelgesellschaft für Entwicklungsländer (OHG) mbH; Lufthansa-Intercontinental-Hotel Verwaltungsgesellschaft, mbH; Düsseldorf Intercontinental Hotels GmbH; Frankfurt Intercontinental Hotels GmbH; Köln Intercontinental Hotels GmbH; Köln Intercontinental Hotels GmbH & Co. KG; Ham-

burger Hotel-Verwaltungsgesellschaft mbH; KG Hamburger Hotel-Verwaltungsgesellschaft mbH & Co.; Hotel Vier Jahreszeiten GmbH; Penta Hotels N.V.; European Hotel Corporation (EHC) München GmbH & Co.; Penta Hotels (France) S.A.; Tourism Promotion Services (Kenya) Ltd.; Tourism Promotion Services (Uganda) Ltd.; First GmbH; First GmbH & Co. KG; Wiesbadener Gründstucksgesellschaft mbH; Deutsches Reisebüro GmbH; Luftfracht-System GmbH; DUS-Jumbo-Finanz-Gesellschaft für Flugzeugverchartterung, mbH; HAM-Jumbo-Flug/ Gesellschaft für Flugzeugvercharterung, mbH; CGN-Jumbo-Flug/Gesellschaft für Flugzeugvercharterung, mbH; MDG, START Datentechnik für Reise und Touristik GmbH; Hansa Luftbild GmbH; Changi International Airport Services Pte. Ltd.; DLT Deutsche Luftverksgesellschaft mbH; Societe Internationals de Telecommunications Aeronautiques (SITA); United Americas Insurance Corporation; Lufthansa Informationstechnik und Software GmbH; MVP Versuchs- und Planungsgsellschaft für Magnetbahnsysteme GmbH; Anchorage Fueling and Service Company; San Francisco Foreign Flag Carriers Corp; Los Angeles West Terminal Fuel Corporation; Los Angeles Technical Equipment Corporation; Nigerian Aviation Handling Company; BAVARIA-LLOYD Reisebüro GmbH.

KLM Royal Dutch Airlines

Air U.K.; AMACO BV; Amsterdam Airport Drugstore BV; Barbizon New York Limited Partnership; Biemans Industries BV; CIAS; Computer Uitwijk Centrum BV; CSH-BHP Limited Partnership; Delta Air Transport NV; Deutech International BV; Holland Organizing Centre BV; Horeca Exploitatie Mij Schip-

hol; Hotel Maatschappij Oud Amsterdam BV; Hotel Mij Leiden BV; Hotel Mij Schiphol BV; Intercai BV; Martinair; Midway House Ltd; NV Hotel Torarica; Paques BV; Polygon Insurance Co. Ltd; Schreiner Luchtvaart Groep BV; Sentraca S.A.*

Lineas Aereas De Espana, S.A.

Instituto Nacional de Industrias (I.N.I.); Aviacion y Comercio (AVIACO).

McDonnell Douglas Corporation

McDonnell Douglas Finance Corporation.

McDonnell Douglas Finance Corporation

McDonnell Douglas Corporation.

Pan American World Airways, Inc.

Aeronautical Radio, Inc.; Air Cargo, Inc.; Airline Tariff Publishing Company; Escola Americana de Rio de Janeiro; Honolulu Fueling Facilities Corporation; International Aeradio (Caribbean) Ltd.; Liberian Development Corporation; Manhattan Air Terminal, Inc.; Nigerian Aviation Handling Co.; Pan Am Corporation; Promotora de Hoteles de Turismo Medillin, S.A.; Radio Aeronautica Paraguaya, S.A.; Social Immobiliaria Norteamericana, S.A.; Societe de Tourisme et Representation; Societe International de Telecommunications Aeronautiques.

Sabena, Belgian World Airlines

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* Barbizon New York Limited Partnership ("BNYLP") is a general partner, and CSH-BHP Limited Partnership ("CSH-BHP") is a limited partner, together with Golden Tulip Barbizon, Inc., ("GTBI"), in the Barbizon Hotel Partnership, a New York limited partnership. GTBI is a wholly-owned indirect subsidiary of KLM Royal Dutch Airlines. Limited Partnership interests in BNYLP and CSH-BHP are held by the public.

Scandinavian Airlines System

Det Danske Luftfartselskab A/S, Denmark; Det Norske Luftfartselskap A/S, Norway; AB Aerotransport, Sweden; Scandinavian Multi Access Systems, AB, Stockholm; A/S Dansk Rejsebureau, Copenhagen; Danair A/S, Copenhagen; Linjeflyg AB, Stockholm; Polygon Insurance Co. Ltd.; Guernsey; Travel Management Group, Sweden AB, Stockholm; Bennett Reisebureau A/S, Oslo; Wideroe's Flyveselskap A/S, Oslo; Greenlandair Inc.; Godthab; Scanator AB, Stockholm; Helikopter Service A/S, Oslo; Kobenhavns Lufthavns Forretningscenter K/S, Copenhagen; Arctic Hotel Corp. A/S Narssarssuaq; AB Resdab, Stockholm; Dar-es-Salaam Airport Handling Co. Ltd, Dar-es-Salaam; Copenhagen Excursions A/S, Copenhagen; Malmo Flygfraktterminal AB, Malmo.

Swissair, Swiss Air Transport Company Limited

Balair Ltd.; CTA Compagnie de Transport Aerien; Airest Restaurant-und Hotelbetriebsgesellschaft mbH; Albergo Brocco e Posta SA; Am Stadtpark Unternehmensbeteiligungsgesellschaft mbH; Avireal Ltd.; Bowers Company Inc.; Buenos Aires Catering SA; Cresta Ferien AG; Flughafen-Immobilien-Gesellschaft (FIG); Heliswiss Swiss Helicopter Ltd.; Hiro-Swissair Immobilienverwertungsgesellschaft mbH; Hoch-Ybig AG; Hotel Atlantis Ltd.; Hotel International Ltd.; Jack Maeder Aircargo Ltd.; Penta Hotels N.V.; Penta Hotels (France) S.A.; Penta Hotels (Switzerland); Polygon Insurance Company Ltd.; St. Peter Port; Popularis Tours; Prohotel Ltd.; Prohotel Laundry Ltd.; Kuoni Travel Ltd.; S.A. des Hotels President; San Bernardino SA Impianti Turistici; Swiss Egyptian Restaurant Corporation (SERCO); Uto-Ring AG;

Hiro-Swissair; Heliswiss; Palace Grand Hotel und Bernerhof AG; Swiss Center Inc. (New York); Swiss Center Ltd. (London); Brienz-Hothorn-Unternemung AG; Schweiz. Gesellschaft Fuer Hotelkredit SGH; Set/Societe D Expansion Touristique S.A.; Belatour S.A.R.L. Mulhouse; Zuercher Freilager AG.

Trans World Airlines, Inc.

Aero Limited Partnership.

Union de Transports Aeriens

Linee Aeree Italiane, S.p.A. has no parent, subsidiary or affiliate whose securities are publicly owned.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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October Term, 1987

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

Using the analysis mandated by the Court in *Associated General Contractors, Inc.* v. *California State Council of Carpenters,* 459 U.S. 519 (1983), both the District Court and a unanimous panel of the District of Columbia Circuit concluded that petitioners, employees of a defunct airline, lack antitrust standing to sue for treble damages alleged to

have resulted from a conspiracy to drive their employer out of business. That result was dictated by appropriate consideration of the circumscribing and guiding factors identified in *Associated General Contractors.*

Petitioners argue that this case "presents a perfect factual situation for resolving the conflict among the circuits on the antitrust standing of participants in a restrained market who are neither competitors of the defendants nor consumers." Petition at 6-7. Not only is there no such conflict, but the Court of Appeals firmly based its decision on those factors in *Associated General Contractors* that are entirely independent of whether petitioners were consumers or competitors in the relevant market.

This case was decided below on the routine application of *Associated General Contractors* and presents no novel or significant issue for the Court to decide. The petition should be denied.

Statement of the Case

This action is the fourth in a series of antitrust suits growing out of the failure of Laker Airways Limited ("Laker") in February 1982. Each suit has been predicated on the same alleged conspiracy to eliminate Laker as a competitor in air transportation between the United States and the United Kingdom. Only a few months ago, this Court denied certiorari in the third of these suits. This fourth suit—particularly when considered in light of the three previous *Laker* litigations—is an example of why Congress did not intend to allow every person tangentially affected by an alleged antitrust violation to maintain an action to recover treble damages. *Blue Shield* v. *McCready,* 457 U.S. 465, 477 (1982).

The first suit was brought by Laker itself in the United States District Court for the District of Columbia against ten airlines, an aircraft manufacturer, and its financing subsidiary.* That suit was settled on October 1, 1985. *See Adams* v. *Pan Am. World Airways, Inc.*, 640 F. Supp. 683, 684 (D.D.C. 1986).

The second litigation, consisting of a number of consolidated class actions, was brought by passengers who claimed that, as a result of the alleged conspiracy, they were forced to pay higher fares for U.S./U.K. air transportation than they would have paid if Laker had remained in the market (*"Laker II"*).** Judge Harold H. Greene approved the settlement of these passenger claims on March 18, 1986. *See* 640 F. Supp. at 684 n.5.

After the first two actions were settled, Laker's counsel brought yet another suit. That action was filed on behalf of a Los Angeles travel agent that had specialized in the sale of Laker tickets, against three of the airlines that have been defendants in each of the other Laker-related actions. *Brian Clewer, Inc.* v. *Pan Am. World Airways, Inc.*, No. 86-6003 (C.D. Cal. filed Jan. 7, 1986). The *Clewer* action, which alleged the same antitrust conspiracy to destroy Laker as is alleged in this case and in the suits previously brought by Laker itself and the transatlantic passengers, was dismissed on May 14, 1986 on the ground that the travel agent lacked antitrust standing under Sec-

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* *Laker Airways Ltd.* v. *Pan Am. World Airways, Inc.*, No. 82-3362 (D.D.C. filed Nov. 24, 1982); *Laker Airways Ltd.* v. *Sabena, Belgian World Airlines*, No. 83-0416 (D.D.C. filed Feb. 15, 1983); *Laker Airways Ltd.* v. *Union de Transports Aeriens*, No. 83-2791 (D.D.C. filed Sept. 22, 1983). These three actions were consolidated on November 11, 1983.

** *In re North Atl. Air Travel Antitrust Litig.*, No. 84-1013 (D.D.C. filed Mar. 30, 1984).

tion 4 of the Clayton Act, 15 U.S.C. § 15. *See* 640 F. Supp. at 684. The Court of Appeals for the Ninth Circuit affirmed. 811 F.2d 1507. This Court denied Clewer's petition for a writ of certiorari on November 2, 1987. No. 87-365.

Also after the first two actions were settled, Laker's counsel brought the present suit on behalf of 313 former employees of Laker against all of the defendants in *Laker I* plus two additional airlines. The plaintiffs filed two separate actions, *Adams* v. *Pan Am. World Airways, Inc.*, No. 86-0304 (D.D.C. filed Feb. 3, 1986) (309 plaintiffs) and *Clifton* v. *Pan Am. World Airways, Inc.*, No. 86-0629 (D.D.C. filed Mar. 7, 1986) (4 plaintiffs). The Laker employees alleged that, as a result of the conspiracy, they lost their jobs. The two actions were consolidated by the District Court.

On June 30, 1986, Judge Greene, who had presided over *Laker I* and *Laker II*, dismissed the consolidated employees' suits on the ground that the employees lacked antitrust standing under Section 4 of the Clayton Act. *Adams* v. *Pan Am. World Airways, Inc.*, 640 F. Supp. 683 (D.D.C. 1986); petition at 18a. More specifically, Judge Greene performed the analysis mandated by *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), and concluded that every one of the factors noted in that decision required dismissal.

First, the employees were neither consumers nor competitors in the market in which they alleged trade was restrained and no unusual circumstances, such as the labor market boycott alleged in *Radovich* v. *National Football League*, 352 U.S. 445 (1957), existed to confer standing. *Second*, any injury suffered by the employees would have been an indirect result of injury suffered by their employer, Laker.

Moreover, Laker and Laker's passengers not only claimed more direct injuries, but had in fact already brought and concluded separate actions before Judge Greene. *Third,* the employees' purported damages were highly speculative owing to intrinsic problems of proof. *Fourth,* given the problems of proof, and the existence of other actual and potential plaintiffs, the action posed difficulties of judicial management, with problems of complex apportionment and risks of duplicative recovery. Petition at 20a-23a.*

The Court of Appeals for the District of Columbia Circuit affirmed, on September 1, 1987. *Adams* v. *Pan Am. World Airways, Inc.,* 828 F.2d 24 (D.C. Cir. 1987); petition at 1a. The Court of Appeals held that although the employees satisfied the threshold requirement of alleging an antitrust injury, the factors controlling under *Associated General Contractors* "compel the conclusion" that they lack standing. *Id.* at 16a.

The court observed that the injuries the employees allege are indirect, being "one step removed from the harm to Laker," that no special circumstances were present to confer standing, and that both Laker and Laker's passengers "have already asserted claims in their own rights, received substantial settlement payments, and vindicated the public interest in antitrust enforcement." *Id.* at 9a-12a. Moreover, the employees' purported damages were so speculative that not to dismiss their claims would "impair the effective enforcement of the antitrust laws." *Id.* at 14a. Finally, there was a risk of multiple recovery or unduly complex litigation

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* Judge Greene also determined, under the authority of *Associated General Contractors,* that the conclusory allegation that the defendants intended to harm the employees was insufficient to establish standing. Petition at 23a n.10; *see* 459 U.S. at 537 ("an allegation of improper motive, although it may support a plaintiff's damages claim under § 4, is not a panacea that will enable any complaint to withstand a motion to dismiss") (footnotes omitted).

owing to the existence of other actual and potential plaintiffs with damage theories inconsistent with those of the employees. *Id.* at 14a-16a.

The employees sought rehearing en banc. The petition was denied, with "[n]o member of the Court request[ing] the taking of a vote thereon." Appendix at 1a.

A petition for a writ of certiorari was filed on January 21, 1988.

Reasons for Denying the Petition

There is not a single issue in this case that was not addressed and resolved by this Court in *Associated General Contractors.* As in that case, although the employees alleged a causal connection between a purported antitrust injury and the harm they suffered, numerous other factors established that they are not proper plaintiffs under Section 4 of the Clayton Act.

> " 'An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy, but "despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable." It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.' "

Associated General Contractors, Inc. v. *California State Council of Carpenters,* 459 U.S. 519, 534-35 (1983) (citation omitted), quoting *Blue Shield* v. *McCready,* 457 U.S. 465, 476-77 (1982). This Court accordingly has identified "factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." 459 U.S. at 537. The Laker

employees, as the courts below emphatically found, fail on each of these factors.

The Laker employees were neither consumers nor competitors in the market in which trade was allegedly restrained. *See* 459 U.S. at 539. They were not airlines competing in the transatlantic market or passengers of Laker or of any other airline competing in that market. They were Laker's employees. 640 F. Supp. at 685, petition at 21a. Indeed, the employees themselves finally admit this, asking the Court to determine the antitrust standing of persons "who are neither competitors of the defendants nor consumers." *Id.* at 7.*

The Laker employees' alleged injury is indirect. *See* 459 U.S. at 540. Their complaint acknowledges that the purpose of the alleged conspiracy "was to eliminate Laker." Amended Complaint ¶ 48, petition at 45a. They do not claim that they sustained any injuries until after this purpose was achieved, *i.e.*, until the receiver "dismantled" Laker and dismissed the employees. "[H]owever [their] final dismissal may be labeled, the harm to [the employees] is one step removed from the harm to Laker." 828 F.2d at 28, petition at 9a.

The indirectness of the employees' claim is evident from the prior *Laker* actions, brought by Laker and passengers

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* The Laker employees argue that they were "participants" in the relevant market, if not consumers or competitors. Petition at 6-7. Not only were petitioners not participants in the market in which the restraints were alleged to have occurred, the only conceivable markets in which virtually all of them were participants were various sub-markets of the United Kingdom labor market. Congress surely did not enact the United States antitrust laws to prevent derivative injuries to participants in a foreign labor market, particularly where the alleged restraint did not even occur in that market. In any case, as the Court of Appeals observed, "[a]stute counsel should not be able, merely by feats of characterization, to confer standing." 828 F.2d at 28, petition at 9a.

in the transatlantic market. And, as this Court has declared,

> "The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general."

459 U.S. at 542. In this case, of course, more immediate plaintiffs—Laker itself and the airline passengers—not only exist, but, in *Laker I* and *Laker II*, "have already asserted claims in their own rights, received substantial settlement payments, and vindicated the public interest in antitrust enforcement." 828 F.2d at 29-30, petition at 12a. Denying the Laker employees a remedy on the basis of their allegations in this case "is not likely to leave a significant antitrust violation undetected or unremedied." 459 U.S. at 542.*

The damages claimed by the Laker employees are highly speculative, "[p]artly because [they are] indirect, and partly because the alleged effects on the [employees] may have been produced by independent factors." 459 U.S. at 542. The employees alleged injuries ranging from lost wages, seniority, job security and pensions to emotional distress and even physical harm suffered in subsequent employment. As the Court of Appeals held,

> "In part plaintiffs' economic fate was tied specifically to Laker; we cannot assume its indefinite sur-

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* Indeed, conferring standing upon the Laker employees is likely to hinder enforcement of the antitrust laws. "[D]efendants in [antitrust] lawsuits are unlikely to enter into settlements if each such settlement can immediately be followed by a new treble damage lawsuit based on the same allegations as the first, the only real distinction being that some new group of alleged victims is bringing the action." 640 F. Supp. at 686, petition at 23a (footnote omitted).

> vival in an exceptionally volatile industry characterized by frequent mergers and bankruptcies. Further, the prosperity of each of the 313 plaintiffs would depend on how long he or she would have remained with Laker, with what advancement, what salary increases, etc. Finally the court would need to consider each plaintiff's prospects of obtaining comparable employment in aviation or other industries."

828 F.2d at 30, petition at 13a (citations & footnotes omitted). The alleged damages of the Laker employees are not merely complex. *See id.* at 13. As recognized by both courts below, their very existence is exceedingly speculative. *Id.* at 13a, 21a-22a.*

The claims of the Laker employees also pose "the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages." 459 U.S. at 544. In the series of lawsuits following Laker's failure, the different plaintiffs and would be plaintiffs have asserted conflicting claims to portions of Laker's projected gross revenues, with these projections based on inconsistent theories of how Laker would have fared had it continued in operation. In *Laker I*, Laker's creditors, stockholders, and attorneys sought damages premised on a projection of high profits for Laker. In *Laker II*, Laker's passengers asserted damages premised on Laker's fares being exceptionally low. Laker's employees seek to collect damages premised on plentiful jobs and generous salaries and benefits. 828 F.2d at 31, petition at 15a. The massive and complex damages litigation that would result from conferring standing on individ-

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* The judgment below, therefore, is entirely consistent with this Court's decision in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931). In that case, although "there was uncertainty as to the extent of the damage, . . . there was none as to the fact of damage." *Id.* at 562.

ual employees such as Laker's would "not only burden[] the courts, but also undermine[] the effectiveness of treble-damages suits." 459 U.S. at 545.

This case is different from *Associated General Contractors* only in that it presents even more compelling factual circumstances in which to recognize that standing is not appropriate for all persons who claim to be injured by an antitrust violation. *See Cargill, Inc.* v. *Monfort, Inc.*, 107 S. Ct. 484, 489 n.5 (1986) ("a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons"). The courts below applied the factors recognized by this Court as being relevant to the inquiry and found that each of them militated in favor of dismissing these claims. The judgment here on review is not based on narrow grounds, but on the entire breadth of *Associated General Contractors* applied to a routine case.

In response, petitioners imagine a conflict among the circuits that does not exist. While hypothesizing that at least six of the circuit courts of appeals likely would have decided this case the same way, petitioners contend that the Second, Fourth and Ninth Circuits "would have probably" decided it in their favor. Petition at 7-9. The conflict petitioners propose is entirely suppositious.

First, as this Court noted in *Associated General Contractors*, "the infinite variety of claims that may arise [under § 4] make it virtually impossible to announce a black-letter rule that will dictate the result in every case." 459 U.S. at 536. Instead, the courts must depend upon various factors "that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." *Id.* at 537. The decisions below reflect the prudent and full exercise of that judgment in a particular

situation, giving full weight to precisely those factors that have been recognized and approved by this Court. Even a hypothetical circuit-split cannot be presumed in the case of such a fact-dependent inquiry.

Second, although the District Court found that the Laker employees were neither consumers nor competitors in the relevant market, the Court of Appeals did not specifically rely on this fact, emphasizing instead the various other factors recognized in *Associated General Contractors.* This demonstrates not only the breadth of the failures in the employees' case, but also undercuts entirely their supposition that this case somehow would result in a conflict among the circuits as to the antitrust standing of persons who are neither consumers nor competitors in the relevant market. A conclusion that petitioners are neither consumers nor competitors supports the dismissal of their claims, but it was not necessary to the judgment below.

Third, the decisions the employees cite in no way conflict with the decision below or with any other decision by a circuit court of appeal. In both *Los Angeles Memorial Coliseum Comm'n* v. *National Football League,* 791 F.2d 1356 (9th Cir. 1986) (*"Raiders II"*), and *Crimpers Promotions Inc.* v. *Home Box Office, Inc.,* 724 F.2d 290 (2d Cir. 1983), *cert. denied,* 467 U.S. 1252 (1984), the courts explicitly stated that the respective plaintiffs were *competitors* in markets in which trade was restrained. 791 F.2d at 1365; 724 F.2d at 296 n.6. These cases thus hardly evidence a conflict among the circuits on the antitrust standing of persons who are *not* consumers or competitors in the relevant market.

Moreover, in *Crimpers* the court expressly found that the plaintiff was the direct victim of a group boycott. 724 F.2d at 297. Similarly, in *Raiders II* the plaintiff stadium

was a victim of a group boycott directly imposed in the stadium market in which the football teams were consumers. In contrast, as the District Court observed, "[t]he Laker employees do not and cannot allege any kind of boycott; when their employer was forced out of business, they had to look for employment elsewhere, and in this endeavor some were successful and some were not." 640 F. Supp. at 685, petition at 21a. Indeed, there is no allegation of *any* restraint in the alleged market, the "market for airline employment" in which the Laker employees argue they were participants. Amended Complaint ¶ 52, petition at 45a.*

The employees' reliance on the Fourth Circuit decision that led to this Court's opinion in *Blue Shield* v. *McCready*, 457 U.S. 465 (1982), is similarly misplaced. The Fourth Circuit's decision predates *Associated General Contractors* and thus cannot reflect any disagreement among the circuits regarding the proper interpretation of that case or the application of its teaching. Moreover, as this Court emphasized in *Associated General Contractors*, McCready was

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* Petitioners also rely on the Ninth Circuit's decision in *Ostrofe* v. *H.S. Crocker Co.*, 740 F.2d 739 (9th Cir. 1984), *cert. dismissed*, 469 U.S. 1200 (1985). *Ostrofe* was a suit brought by a marketing director and sales manager against his employer and its competitors after the marketing director was discharged for refusing to implement a price-fixing conspiracy. Because the plaintiff alleged he was the victim of a boycott in the labor market, he clearly had standing to sue, but the Ninth Circuit went on to conclude he would also have standing to challenge the price-fixing conspiracy in the product market because he "was such an integral part of the scheme to eliminate competition." 740 F.2d at 746. The court emphasized that there was "no one else with as strong an incentive to 'vindicate the public interest in antitrust enforcement' " and that criminal proceedings had begun only after plaintiff's disclosure of the conspiracy. *Id.* (citation omitted). Thus, *Ostrofe* was expressly motivated by the special policy considerations involved in the protections afforded whistle-blowers who are fired for refusing to participate in the conspiracy.

both a consumer of services in the restrained market and a direct victim of a group boycott. 459 U.S. at 530 n.19 & 538.*

In short, the courts below applied the analysis mandated by this Court in *Associated General Contractors* and, based upon the guiding factors discussed in that decision, came to the inevitable conclusion that the Laker employees do not have standing under Section 4. The judgment below presents no disagreement among the circuits, and there is no reason to revisit the underlying basis for that judgment which was so recently and unequivocally declared by this Court.

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* The Laker employees argue that their position is similar to the plaintiff's in *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948). Petition at 7. As noted in *Associated General Contractors*, however, the plaintiff in *Mandeville* was directly harmed by the sugar refineries which had allegedly conspired to fix the price they would pay for beets. 459 U.S. at 529 n.19.

Conclusion

For the foregoing reasons, respondents request that the Court deny the petition for a writ of certiorari.

February 20, 1988

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987

No. 86-5468

DAVID WEAVER ADAMS, *et al.*,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,
a domestic corporation, *et al.*,

AND CONSOLIDATED CASES

[Filed Oct. 23, 1987]

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

Appellants' suggestion for rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER, *Clerk*
BY: ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

Circuit Judge Sentelle did not participate in this order.